IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

JULIE ANN HAMSTEAD,

Plaintiff,

v. **CIVIL ACTION NO.: 3:18-CV-79**
(Honorable Gina M. Groh)

WEST VIRGINIA STATE POLICE;
TROOPER D. R. WALKER, in his official capacity;
CITY OF RANSON, WEST VIRGINIA;
SARGEANT KEITH SIGULINSKY, in his official capacity;
CITY OF CHARLES TOWN, WEST VIRGINIA;
MASTER PATROLMAN JASON NEWLIN,
in his official capacity; THE WEST VIRGINIA
DIVISION OF HIGHWAYS; RODNEY D. HEDRICK, SR.,
in his official capacity; KYLE REED KOPPENHAVER,
in his official capacity; A.B., an unknown individual
known as the West Virginia Department of Highways'
"Muscle Man" on the 2016 Ranson-Charles Town
Green Corridor Fairfax Boulevard Project;
JEFFERSON CONTRACTING, INC., a corporation;
JEFFERSON ASPHALT PRODUCTS COMPANY, a corporation;
DALE DEGRAVE; ALLEN SHUTTS; JOHN TIMOTHY MORRIS;
WEST VIRGINIA UNIVERSITY HOSPITALS-EAST, INC., dba
"Jefferson Medical Center"; KELLY HALBERT, RN;
and X, Y, and Z, unknown persons who conspired and/or
aided and abetted in the fabrication of false criminal charges
against Julie Hamstead,

Defendants.

DEFENDANTS WEST VIRGINIA STATE POLICE AND TROOPER D. R. WALKER'S RESPONSE TO PLAINTIFF'S
MOTIONS TO VACATE JUDGMENT AND FOR LEAVE TO AMEND

Incredibly, after amending her initial Complaint as of right in response to five separate motions to dismiss, and after then steadfastly maintaining in response to six motions to dismiss that her revised pleading was sufficient to state a claim—and only after the Court granted one motion to dismiss—Plaintiff Julie Ann Hamstead now seeks to vacate the Court's Order granting Defendants West Virginia State Police and Trooper D.R. Walker's (collectively, the "State Police Defendants") motion to dismiss. Mrs. Hamstead also seeks to amend her pleading once again in an attempt to drag the State Police Defendants back into this case and have a "second bite at the apple" against them while simultaneously defeating the six motions to dismiss that are currently pending against her First Amended Complaint.[1] Yet, Mrs. Hamstead offers no reason why she could not have amended her complaint *before* the Court granted the State Police Defendants' Motion to Dismiss. Such dilatory conduct should not be permitted by this Court.

I. STANDARD OF DECISION

As an initial matter, Plaintiff's Rule 59(e) Motion to Vacate Judgment to Allow Post Judgment Motion for Leave to Amend ("Motion to Vacate," ECF No. 85) is brought under the wrong Rule. In the Court's Order Granting West Virginia State Police and Trooper Walker's Motion to Dismiss First Amended Complaint ("Dismissal Order," ECF No. 83), the Court did not direct entry of a final judgment as to the State Police Defendants. Therefore, because the Dismissal Order does not adjudicate all the rights and claims of all the parties, it is not a judgment that is subject to a Rule 59(e) motion to alter or amend. Fed. R. Civ. P. 54(b). Instead, the Dismissal Order is an interlocutory order, which may be revised at any time before the entry of a judgment. *Id.*

[1] After Ms. Hamstead filed the Plaintiff's Rule 59(e) Motion to Vacate Judgment to Allow Post Judgment Motion for Leave to Amend (ECF No. 85) and Plaintiff's Motion for Leave to Amend and to Supplement First Amended Complaint (ECF No. 86), Defendant Kelly Halbert filed a motion to dismiss the First Amended Complaint (ECF No. 87).

While courts have discretion under Rule 54(b) whether to reconsider an order, such discretion is not limitless. *U.S. Tobacco Coop. Inc. v. Big South Wholesale of Va., LLC*, 899 F.3d 236, 256 (4th Cir. 2018). Importantly, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason, permitted to battle for it again." *Id.* at 257 (internal quotation and citation omitted).

Although it does not appear the Fourth Circuit has directly addressed the proper standard for deciding motions for leave to amend following an interlocutory dismissal order, the standard is likely the same as that for any Rule 15(a) motion for leave to amend. *AdvanFort Co. v. Int'l Registries, Inc.*, Civil Action No. 1:15-cv-220, 2015 WL 4254988, at *4 (E.D. Va. July 13, 2015); *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (holding that a post-*judgment* motion to amend is evaluated under Rule 15 standards); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003) (noting that reconsideration under Rule 54(b) is not subject to as strict of standards as reconsideration of a final judgment).

Therefore, Plaintiff's Motion for Leave to Amend and to Supplement First Amended Complaint ("Motion to Amend," ECF No. 86) should be denied only if (1) the amendment would be prejudicial to an opposing party; (2) it is brought in bad faith; or (3) the amendment would be futile. *Laber*, 438 F.3d at 426. Should the Court deny Mrs. Hamstead's Motion to Amend, however, her Motion to Vacate should only be granted if (1) there has been substantially different evidence discovered that justifies a different outcome; (2) there has been a change in the applicable law; or (3) there was a clear error that caused manifest injustice. *U.S. Tobacco Coop. Inc.*, 899 F.3d at 257.

II. ARGUMENT

All three grounds for denying leave to amend can be found in Mrs. Hamstead's Motion to Amend and the proposed Second Amended Complaint (ECF No. 86-1): Her unexcused delay in waiting until after the Court granted the State Police Defendants' motion to dismiss is indicative of

bad faith; permitting her to amend her pleading would unduly prejudice the State Police Defendants, who already spent considerable time and effort to obtain dismissal; and the proposed Second Amended Complaint is futile because its causes of action are either subject to dismissal on the same grounds as outlined in the Court's Dismissal Order, or it fails to plead facts to survive a motion to dismiss the new causes of action it brings.

Similarly, the Motion to Vacate also should be denied. Mrs. Hamstead's stated reason for bringing the motion is to permit amendment of her pleading. Yet, there are no grounds to permit amendment of the complaint, and Mrs. Hamstead can identify no other valid reason for the Court to vacate the Dismissal Order. Consequently, the Court should deny both the Motion to Amend and the Motion to Vacate.

A. The Court Should Deny Mrs. Hamstead Leave to Amend Because the Motion Is Brought in Bad Faith, It Would Unduly Prejudice the State Police Defendants, and the Proposed Second Amended Complaint Is Futile.

Mrs. Hamstead's Motion to Amend should be denied because she presents no valid reason for the belated motion. To the contrary, it is clear that every permissible reason for denying a motion to amend is present here.

As an initial matter, Mrs. Hamstead misstates both the reason for the Court's Dismissal Order and the content of the State Police Defendants' dismissal briefs. Mrs. Hamstead claims that the Court granted the State Police Defendants' motion to dismiss because the Court found "the pleadings were inadequate to state any claim against said State Police Defendants." Mot. to Amend ¶ 4. This is only partially true. While the Court took issue with Mrs. Hamstead's "shotgun pleading" style and found that several counts failed to state recognized claims, it also found that several claims were defeated by the State Police Defendants' entitlement to qualified immunity. *See*, *e.g.*, Dismissal Order 10, 13, 16.

Mrs. Hamstead also misstates the content of the State Police Defendants' dismissal briefs. According to Mrs. Hamstead, the Court relied upon an exhibit attached to the State Police

Defendants' opening brief, which indicated that Mrs. Hamstead had been convicted of disorderly conduct and obstructing an officer. Mot. to Amend. ¶ 7. Mrs. Hamstead then goes on to state that the State Police Defendants "failed to point out to the Court that the Magistrate Court Order presented to this Court as an exhibit was not a final order and that a de novo appeal to the Circuit Court of Jefferson County had been filed." *Id.* at ¶ 8. This is untrue. The State Police Defendants pointed out in both their opening brief and their reply brief that Mrs. Hamstead was appealing her conviction to the Circuit Court. Mem. in Supp. of Mot. to Dismiss 4 (ECF No. 43); Reply Br. 7 (ECF No. 69). Moreover, the State Police Defendants attached the Notice of Appeal as an exhibit to their opening brief. (ECF No. 43-9).

Not only does Mrs. Hamstead fail to identify any reason for the Court to grant her Motion to Amend, every reason for the Court to deny the Motion is present.

1. Mrs. Hamstead's Unexcused Delay in Bringing the Motion to Amend Until After the Court Granted the Dismissal Order Is Indicative of Bad Faith.

The Court should deny Mrs. Hamstead's Motion to Amend because she offers no reason why she waited until after the Court granted the State Police Defendants' Motion to Dismiss to seek leave to amend. Courts have found that unexcused delay in moving to amend is indicative of bad faith.

While delay alone is not sufficient reason to deny a motion to amend, this Court has stated that the goals of Rule 15 and the interests of justice must be weighed when considering such a motion. *Logar v. W. Va. Univ. Bd. of Governors*, Civil Action No. 1:10CV201, 2012 WL 243692, at *5 (N.D.W. Va. Jan. 25, 2012). Moreover, "unexcused delay is often . . . considered evidence of dilatory motive and prejudice to the non-movant when leave to amend is sought after the district court has dismissed plaintiff's claims." *Id.*

Here, Mrs. Hamstead offers no reason why she did not seek to amend her pleading to correct the deficiencies identified in the State Police Defendants' motion to dismiss (and the other

five motions to dismiss). Clearly, Mrs. Hamstead understood that she could amend her pleading even after motions to dismiss were filed. After Defendants filed five motions to dismiss the original complaint in this matter (ECF Nos. 4, 9, 13, 15, and 23), Mrs. Hamstead amended her pleading as a matter of course under Rule 15(a)(1). 1st Am. Compl. (ECF No. 30). Yet, after the State Police Defendants filed their motion to dismiss (ECF No. 40), along with all other Defendants who had been served (ECF Nos. 34, 44, 48, 51, 53), Mrs. Hamstead did not seek leave of this Court to amend her pleading again. Instead, Mrs. Hamstead steadfastly maintained in the face of six motions to dismiss, all of which identified shortcomings in the factual allegations, that her pleadings stated valid claims against Defendants. Resp. Brs. (ECF Nos. 60-62, 66, 68, 70). For example, in response to the State Police Defendants' argument that Mrs. Hamstead could not seek monetary damages under 42 U.S.C. § 1983 from Trooper Walker in his official capacity, Mrs. Hamstead did not seek to amend her complaint to plead a Section 1983 claim against Trooper Walker in his individual capacity (as she attempts to do in the Second Amended Complaint). She instead argued that *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) did not apply to the facts of this case. Resp. Br. 9 (ECF No. 61).

"The timeliness of a plaintiff's motion to amend is a critical factor in assessing dilatory motive, undue delay, bad faith, and prejudice." *Harding v. Kellam*, 155 F.3d 559 (4th Cir. 1998) (unpublished opinion). The State Police Defendants' motion to dismiss was fully briefed by July 16, 2018. (ECF No. 69). The Court did not enter its Dismissal Order until August 28, 2018. (ECF No. 83). Thus, Mrs. Hamstead was fully on notice for six weeks of the State Police Defendants' arguments that the First Amended Complaint failed to state a claim upon which relief could be granted and the grounds for those arguments—specifically, that the First Amended Complaint either did not allege viable causes of action, did not allege sufficient facts to support recognized causes of action, or did not allege sufficient facts to overcome the State Police Defendants' qualified immunity from any valid causes of action. During this entire time, Mrs. Hamstead was

aware that this Court may decide that her complaint did not state a viable cause of action against the State Police Defendants. At no time before this Court entered the Dismissal Order did Mrs. Hamstead seek leave to amend her complaint. In her Motion to Amend, Mrs. Hamstead offers absolutely no reason for this undue delay. Her unexcused delay evidences bad faith. *See Logar*, 2012 WL 243692, at *5-7; *Kerr v. Marshall Univ. Bd. of Governors*, Civil Action No. 2:14-cv-12333, 2018 WL 934614, at *5 (S.D.W. Va. Feb. 16, 2018) (finding plaintiff acted in dilatory manner indicative of bad faith by seeking to amend her complaint after the court granted defendants' motion to dismiss because motion put plaintiff on notice that her complaint might be inadequate, but plaintiff opposed the motion rather than seeking leave to amend).

Moreover, there are no new facts alleged in the proposed Second Amended Complaint that were not known to Mrs. Hamstead prior to the Court entering the Dismissal Order. Indeed, all facts alleged in the Second Amended Complaint had to have been known to Mrs. Hamstead prior to the Court entering the Dismissal Order because the Court has stayed discovery in this matter, pending the motions to dismiss. Order Granting Defs.' Mot. for Protective Order (ECF No. 73). Thus, she did not learn new facts through discovery that required a late amendment of her complaint. A plaintiff's knowledge of the facts underlying a proposed amended pleading, "such that [s]he could have included them or sought an amendment earlier than [s]he did," supports a finding of bad faith. *Gum v. Gen. Elec. Co.*, 5 F. Supp.2d 412, 415 (S.D.W. Va. 1998); *Mitsubishi Aircraft Int'l, Inc. v. Brady*, 780 F.2d 1199, 1203 (5th Cir. 1986) (denying plaintiff's motion to amend to add a new claim, noting that because the claim was apparent at the outset of the case, plaintiff's failure to allege it until after summary judgment was entered "strongly suggests either a lack of diligence on its part or a lack of sincerity").

Mrs. Hamstead argues that her motions are timely because she seeks to amend her complaint "within the time permitted by this Court's Scheduling Order." Mem. in Supp. of Mot. to Vacate 2 (ECF No. 85-1). The Court has rejected this very argument before. *Logar*, 2012 WL

243692, at *8 ("Simply because this Court set a deadline for amendments in the original scheduling order, does not mean that it cannot consider, under the individual circumstances of this case following issuance of that order, whether amendment is appropriate at whatever time it may be requested, be it before that deadline or not.")

Mrs. Hamstead offers absolutely no reason why she could not have amended her pleading *before* the Court entered the Dismissal Order. Her unexcused delay in pleading facts that were known from the outset of this matter and raising arguments that could have been raised before dismissal indicates that her Motion to Amend is brought in bad faith. For this reason alone, the Court should deny the Motion. Moreover, as set forth below, the proposed amendment would unduly prejudice the State Police Defendants and is futile.

2. Permitting Mrs. Hamstead to Amend Her Complaint After the State Police Defendants Have Been Dismissed Would Unduly Prejudice the State Police Defendants.

The Court should also deny the Motion to Amend because granting it would unduly prejudice the State Police Defendants, who have already devoted considerable time and effort to securing the Dismissal Order.

The discretion afforded to district courts to reconsider orders under Rule 54(b) is "subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *U.S. Tobacco Coop. Inc. v. Big South Wholesale of Va., LLC*, 899 F.3d 236, 257 (4th Cir. 2018) (internal quotation and citation omitted). Thus, the standard for granting a motion to reconsider under Rule 54(b) "closely resembles" the standard applicable to Rule 59(e) motions. *Id.* In the context of post-judgment motions to amend under Rule 59(e), it has been observed that such motions "are not favored under law." *Laber v. Harvey*, 438 F.3d 404, 432 (4th Cir. 2006) (Wilkinson, J., concurring). Thus, "the interest in finality that attaches to every judgment must of necessity weigh in the exercise of the

district court's discretion in a filing such as this." *Id.* at 433. This is because post-dismissal motions for leave to amend "serve only to string litigation out." *Id.*

As Judge Wilkinson observed in *Laber*, "It takes a great deal of time and effort for a party to win any judgment. This effort should not be routinely undone after a decision of the district court alerts a losing party to the deficiencies in its case." *Id.* at 432-33. Indeed, the fact that a plaintiff delays in raising claims that were known even before the filing of the original complaint until after dismissal stands "in itself, [as] a representation of substantial prejudice to the defendants." *Logar*, 2012 WL 243692, at *8.

Prejudice would be especially present in this case. The State Police Defendants had to draft and file four briefs in order to secure the Dismissal Order—a Motion to Exceed Page Limit (ECF No. 39), the Motion to Dismiss and Memorandum in Support of Motion to Dismiss (ECF Nos. 40, 43), the Reply to Plaintiff's Memorandum in Response to Motion to Dismiss (ECF No. 69), and finally—because Mrs. Hamstead improperly moved to strike the State Police Defendants' entire dismissal brief—a Response to Plaintiff's Motion to Strike (ECF No. 65).

Moreover, the concerns of Rule 15(a) are not at play here. "Rule 15(a) is designed to allow parties the opportunity to amend pleadings 'to assert matters which were overlooked or were unknown at the time the party interposed the original complaint.'" *Logar*, 2012 WL 243692, at *9 (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1472 (3d ed. 2010)). As set forth above, Mrs. Hamstead is not seeking to add claims or factual allegations that previously were unknown to her. Nor was her case dismissed based upon a procedural technicality. She was aware from the time the State Police Defendants filed their motion to dismiss on June 25, 2018—more than three months before the Court entered the Dismissal Order—of possible deficiencies in the First Amended Complaint. But she did not seek leave to amend her pleading until after the Court dismissed her claims against the State Police Defendants.

The continued litigation of these issues expends the State Police Defendants' time, money, resources, and patience by "stringing out" this litigation. Thus, granting Mrs. Hamstead leave to amend her complaint would unquestionably cause undue prejudice to the State Police Defendants. For this additional reason, the Court should deny Mrs. Hamstead's Motion to Amend.

3. Permitting Mrs. Hamstead to File the Second Amended Complaint Would Be Futile, as It Would Not Survive a Motion to Dismiss.

The Court should also deny Mrs. Hamstead leave to file the proposed Second Amended Complaint because the proposed amendment is futile. The new pleading simply restates causes of action already dismissed by the Court without addressing the grounds for dismissal. To the extent that the Second Amended Complaint asserts new causes of action, it fails to allege facts to make those new claims plausible.

A proposed amended complaint is futile if it could not withstand a motion to dismiss. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995). A proposed amended complaint is also futile if "it merely restates a claim on which the court has already ruled." *Scinto v. Preston*, No. 4:03-CV-178-H, 2009 WL 8666488, at *3 (E.D.N.C. Dec. 11, 2009) (citing 3 *Moore's Federal Practice* § 15.15[3] (3d ed. 2000)).

a. The Second Amended Complaint Merely Restates Claims the Court Has Already Rejected.

Although the proposed Second Amended Complaint adds additional allegations, it essentially restates the Malicious Prosecution; Abuse of Process; Battery; Negligent Hiring, Training, and Supervision; and Outrage counts, which the Court found failed to state a claim against the State Police Defendants.[2] The additional allegations added in the new pleading do nothing to salvage these claims, and the same arguments and authority that resulted in the Court granting the State Police Defendants' Motion to Dismiss the First Amended Complaint apply here.

[2] In addition, the Second Amended Complaint drops the State Police Defendants from the Negligence Count. 2d Am. Compl. ¶ 183 (ECF No. 86-1). Also, the State Police is no longer included in the Respondeat Superior count. *Id.* at ¶¶ 198-202.

The Second Amended Complaint does not cure the deficiencies in Mrs. Hamstead's Malicious Prosecution count. The Court dismissed the Malicious Prosecution count against Trooper Walker because Mrs. Hamstead failed to plausibly allege that Trooper Walker charged her without probable cause and because he is entitled to qualified immunity, but Mrs. Hamstead did not allege any violation of a clearly established statutory or constitutional right or law. Dismissal Order 9-10. In the Second Amended Complaint, Mrs. Hamstead attempts to plead a lack of probable cause by alleging that Trooper Walker arrested her for destruction of property even though "the extent of the injury to DeGrave's truck must have been such as to impair the utility or diminish the value of such property" in order to constitute the offense. 2d. Am. Compl. ¶¶ 132-33. Contrary to Mrs. Hamstead's assertion, however, injury so as to impair the utility or diminish the value of property is not an element of the crime of destruction of property. W. Va. Code § 61-3-30(a). All that is required is that the accused unlawfully, but not feloniously, "destroys, injures, or defaces" the property of another. *Id.* The allegations in the Second Amended Complaint, as in the First Amended Complaint, are that John Morris screamed out to the responding officers as they approached the scene that Mrs. Hamstead ran into the Jefferson Asphalt truck and that when Mrs. Hamstead asked Kyle Koppenhaver "to tell the police the truth," he stared back at her so as to support Morris's statement. 2d Am. Compl. ¶¶ 36, 40-41. Mrs. Hamstead fails to identify any clearly established law that prohibits a police officer from finding probable cause, or at least arguable probable cause, based upon the identification of an eyewitness. *See* Mem. in Supp. of Mot. to Dismiss 8-10; Reply Br. 4.

Mrs. Hamstead does not allege a valid Abuse of Process claim in the proposed Second Amended Complaint. As the Court found, in the First Amended Complaint, Mrs. Hamstead did not allege that Trooper Walker willfully or maliciously misused or misapplied lawfully issued process to accomplish a purpose for which that process was not warranted. Dismissal Order 12. So, too, in the Second Amended Complaint. In her amended pleading, Mrs. Hamstead tries to plead an abuse

of process claim by alleging that Trooper Walker's "primary motive" in allegedly fabricating evidence was to "improperly charge" Mrs. Hamstead in order to justify his use of force. 2d Am. Compl. ¶ 163. Even accepting these allegations as true, Mrs. Hamstead has not alleged that Trooper Walker used the judicial process for an improper purpose *after* he filed the criminal complaint against her; instead, she alleges that the mere filing of the criminal complaint was improperly motivated. This does not state an abuse of process claim. *See* Mem. in Supp. of Mot. to Dismiss 14-15. Regardless of whether the initial decision to file a criminal complaint is proper, the prosecution of that complaint by an officer is a proper use of the legal process. *Dunne v. Twp. of Springfield*, Civil No. 08-5605, 2011 WL 2269963, at *9 (D.N.J. Jan. 31, 2011), *aff'd* 500 Fed. App'x 136 (3d Cir. 2012).

Mrs. Hamstead's allegations of battery are essentially unchanged between the two pleadings. *Compare* 1st Am. Compl. ¶ 42 *with* 2d Am. Compl. ¶ 45. As the Court found, there are no allegations that suggest Trooper Walker used excessive force in making a lawful arrest of Mrs. Hamstead for obstructing an officer and disorderly conduct. Dismissal Order 13. Because Trooper Walker made a lawful arrest of Mrs. Hamstead, causing *de minimis* injury, he is entitled to qualified immunity from her battery claim, and Mrs. Hamstead makes no allegations in the Second Amended Complaint that takes him outside of qualified immunity. *Pegg v. Herrnberger*, 845 F.3d 112, 120 (4th Cir. 2017).[3]

The Second Amended Complaint does not cure the deficiencies in Mrs. Hamstead's Negligent Hiring, Training, and Supervision count against the State Police. The Court dismissed this count in the First Amended Complaint because Mrs. Hamstead did not identify any clearly established law that the State Police allegedly violated in performing the discretionary functions of

[3] Although Mrs. Hamstead alleges that she suffered "severe and permanent injuries to her neck, back and left arm" as a result of Trooper Walker's arrest, this conclusory allegation is contradicted by the other specific factual allegations in the proposed Second Amended Complaint, where she alleges that she only suffered an abrasion to her knees and was released from the hospital on the day of the arrest with only a "possible" muscle tear to her arm. *Compare* 2d Am. Compl. ¶ 171 *with* ¶¶ 45, 69.

hiring, training, and supervising Trooper Walker. Dismissal Order 16-17. In particular, the Court noted that Mrs. Hamstead "offers a list of actions or omissions that the various officers allegedly committed and avers that the WVSP failed to properly train their 'officers'; 'troopers' or 'Trooper Walker' not to do those alleged improper actions or omissions." *Id.* at 16. Mrs. Hamstead's allegation in this regard is virtually the same in the proposed Second Amended Complaint as it was in the First Amended Complaint. *Compare* 1st Am. Compl. ¶ 106 *with* 2d Am. Compl. ¶ 210. Additionally, although Mrs. Hamstead now claims that the State Police had knowledge of Trooper Walker's alleged history of misconduct (2d Am. Compl. ¶¶ 204-207, 209), she still does not identify any clearly established law that the State Police is alleged to have violated in its hiring, training, or supervision of Trooper Walker. Thus, the State Police is entitled to qualified immunity from the latest iteration of this count. *See* Mem. in Supp. of Mot. to Dismiss 27-28.

Mrs. Hamstead's outrage count in the Second Amended Complaint is essentially the same as it was in the First Amended Complaint. Although she adds factual allegations to the count, Mrs. Hamstead still claims that her "arrest and beating" for "crimes she did not commit," along with Defendants' "participation in code of silence" and "fabrication of evidence" was outrageous. 2d Am. Compl. ¶ 218. These are basically the same allegations from the First Amended Complaint, although she now expressly brings them under the heading of the outrage count. First, Mrs. Hamstead was not arrested and "beaten" for "crimes she did not commit." She was found guilty of obstructing an officer and disorderly conduct. Criminal Judgment Orders, attached as "Exhibit 8" to the State Police Defendants' Dismissal Brief (ECF 43-8).[4] As the State Police Defendants argued before, allegations that Trooper Walker carried out a lawful arrest cannot sustain an outrage claim. Mem. in Supp. of Mot. to Dismiss 20. Furthermore, although Mrs. Hamstead continues to allege that Defendants "fabricated evidence" by moving her car to create skid marks and

[4] Although the Court granted Mrs. Hamstead's Motion to Strike as to most of the exhibits attached to the State Police Defendants' dismissal brief, the Court found that it could properly take judicial notice of Exhibits 8 and 9, which were court records. Dismissal Order 5.

participated in a "code of silence," she also made these allegations in the First Amended Complaint (*see, e.g.*, 1st Am. Compl. ¶¶ 46, 117), and the Court noted that it could not find any supporting facts within that pleading to support the count. Dismissal Order 15.

In sum, the counts in the proposed Second Amended Complaint that are common to the First Amended Complaint fail for the same reasons identified by the Court in the Dismissal Order. The new counts raised in Mrs. Hamstead's amended pleading are subject to dismissal, too.

b. New Causes of Action Raised in the Second Amended Complaint Would Not Survive a Motion to Dismiss.

Mrs. Hamstead attempts to add four new counts in the proposed Second Amended Complaint: "42 U.S.C. § 1983 Violation, Violation of First, Fourth and Fourteenth Amendment Rights" (Count IX); "Spoliation of Evidence" (Count X); "Fraud and Conspiracy to Commit Fraud" (Count XI); and "Violation of Equal Protection" (Count XV). 2d Am. Compl. ¶¶ 174-182, 215-16. She does not plead facts to make any of these claims plausible, however.

Although Mrs. Hamstead appears to be suing Trooper Walker in his individual capacity in the Second Amended Complaint, which would subject him to potential liability under Section 1983, she does not plead any facts to show that he violated clearly established law by arresting her based upon probable cause and using the minimal force required to effect her arrest. Although Mrs. Hamstead claims that Trooper Walker violated her rights "under the First, Fourth and Fourteenth Amendment [*sic*] of the United States Constitution in violation of 42 U.S.C. § 1983," she does not identify with particularity any clearly established law he allegedly violated. *Id.* at ¶ 175.

It is not clear from the Second Amended Complaint under exactly which Section 1983 theory Mrs. Hamstead seeks to impose liability on Trooper Walker. Nonetheless, the essential elements of any Section 1983 action are: (1) that the defendant was acting under color of state law; and (2) that the defendant's actions deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988).

To the extent Mrs. Hamstead invokes the First Amendment, it appears she is alleging a retaliatory arrest. In order to state a claim under Section 1983 for retaliatory arrest in violation of the First Amendment, a plaintiff must show that (1) she engaged in protected speech, (2) the defendant's alleged retaliatory action adversely affected the plaintiff's protected speech, and (3) a causal relationship exists between the speech and the alleged retaliatory action. *Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015). The causal requirement, however, is a rigorous one: It is not enough that the protected speech played a role in the arrest; the plaintiff must demonstrate that "but for" the speech, the officer would not have made the arrest. *Id.* In other words, the plaintiff must show that the government official acted "because of, not merely in spite of, the action's adverse effects" upon her protected speech. *Ross v. Early*, 746 F.3d 546, 560-61 (4th Cir. 2014) (internal quotation and citation omitted).

To the extent Mrs. Hamstead invokes the Fourth Amendment, she may be alleging either false arrest or malicious prosecution, given the factual allegations in the amended pleading. To state a claim for false arrest under Section 1983, a plaintiff must demonstrate that she was arrested without probable cause. *See Street v. Surdyka*, 492 F.2d 368, 372–73 (4th Cir. 1974). Similarly, "[a] malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (internal quotation and citation omitted). The elements of a Section 1983 "malicious prosecution" claim are that a "defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Id.*

The existence of probable cause, or even arguable probable cause, for an arrest defeats claims under Section 1983 for unlawful arrest in violation of either the First or Fourth Amendments. *Pegg v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017). (finding that officer was entitled to qualified immunity from plaintiff's Fourth Amendment unlawful arrest and First

Amendment retaliatory arrest claims due to the existence of probable cause for arrest). Mrs. Hamstead's convictions for disorderly conduct and obstructing an officer conclusively prove that Trooper Walker had probable cause to arrest her for those charges, and as set forth above, he had at least arguable probable cause—based upon eyewitness identification of Mrs. Hamstead as the person who ran into the Jefferson Asphalt truck—to charge her with destruction of property.

Alternatively, Trooper Walker is entitled to qualified immunity from Mrs. Hamstead's Section 1983 claims.[5] In order to be entitled to qualified immunity from a Section 1983 claim, a defendant must either show (1) that no constitutional violation occurred; or (2) that the right violated was not clearly established at the time it was violated. *Hunter v. Town of Mocksville, N.C.*, 789 F.3d 389, 396 (4th Cir. 2015). A court may consider either prong first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A right is "clearly established" for qualified immunity purposes if the contours of the right are sufficiently clear so that a reasonable officer would understand that what he is doing violates the right. *Cox v. Quinn*, 828 F.2d 227, 238 (4th Cir. 2016). The right at issue, however, is not defined as a broad general proposition, but rather, in light of the specific context of the case. *Id.* Accordingly, in order to defeat qualified immunity, it is not sufficient for Mrs. Hamstead to simply allege that Trooper Walker violated her constitutional rights. She must identify a clearly established law of which a reasonable officer would be aware, which holds that Trooper Walker could not arrest her for destruction of property, obstructing an officer, and disorderly conduct, given the facts that he had at the time of the arrest. She fails to do so. Thus, Trooper Walker is entitled to qualified immunity from Mrs. Hamstead's Section 1983 count.

[5] Because a Section 1983 claim requires a violation of a right protected by the Constitution or federal law, and the qualified immunity analysis also looks to whether there was a violation of clearly established law, the availability of qualified immunity overlaps substantially with the merits of a constitutional claim. *O'Bar v. Pinion*, 953 F.2d 74, 80 (4th Cir. 1991). Regardless of the analysis used, it is clear that Mrs. Hamstead does not plead a viable Section 1983 claim against Trooper Walker.

Mrs. Hamstead also does not plead sufficient facts in the Second Amended Complaint to state a plausible spoliation of evidence claim. Under West Virginia law, the tort of intentional spoliation of evidence consists of seven elements:

> (1) a pending or potential *civil* action;
> (2) knowledge of the spoliator of the pending or potential *civil* action;
> (3) willful *destruction* of evidence;
> (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;
> (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;
> (6) the party's inability to prevail in the civil action; and
> (7) damages.

Syl. Pt. 11, *Hannah v. Heeter*, 213 W. Va. 704, 715, 584 S.E.2d 560, 572 (2003) (emphasis added).

Mrs. Hamstead's allegations fail to state an intentional spoliation claim for several reasons. First, her allegations are that Trooper Walker and other Defendants moved her vehicle, not in anticipation of *civil* litigation, but to "fraudulently manufacture evidence" to support the *criminal* charges against her. 2d Am. Compl. ¶ 53. Second, she does not allege that Trooper Walker destroyed evidence, but that he "manufactured" evidence. *Id.* That is, that an unnamed Defendant drove her car to create skid marks in the gravel to support the destruction of property charge against her. *Id.* at ¶¶ 49-50. Third, even if the Court considers an intentional spoliation of evidence action in the context of Mrs. Hamstead's criminal proceedings, it is clear that if Defendants moved Mrs. Hamstead's car to manufacture evidence, the "spoliation" did not prevent Mrs. Hamstead from prevailing in the criminal action; she was acquitted of destruction of property. *Id.* at ¶ 132. Finally, if it is Mrs. Hamstead's contention that Trooper Walker moved her car in order to "manufacture evidence" in order to prevail in this civil action, there are no allegations that Trooper Walker knew of a potential civil action, that he destroyed evidence, that his alleged conduct was undertaken with the specific intent of defeating this lawsuit, or that his alleged conduct prevented

Mrs. Hamstead from prevailing in a civil action.[6] Indeed, the District Court for the Southern District of West Virginia has noted in dictum that an intentional spoliation claim cannot be brought while the underlying civil claim is still proceeding. *See Green v. CSX Hotels, Inc.* 650 F. Supp. 2d 512, 526 (S.D.W. Va. 2009) (finding that it was impossible for plaintiff to show that she would have prevailed in the underlying claim but for the spoliation of evidence because underlying retaliation claim was still ongoing). For all these reasons, Mrs. Hamstead's spoliation of evidence claim is futile.

Similarly, Mrs. Hamstead does not plead sufficient facts to plead a fraud count. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; [3] that plaintiff relied upon it and was justified under the circumstances in relying upon it; and [4] that he was damaged because he relied upon it." Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981) (internal quotation and citation omitted). The purportedly fraudulent act Mrs. Hamstead bases this count on is the alleged creation of tire tracks. 2d Am. Compl. ¶ 179. Nowhere in the Second Amended Complaint, however, are there any allegations that Mrs. Hamstead relied upon any act of Trooper Walker or any act induced by him. Therefore, she has failed to plead a fraud claim.

Finally, Mrs. Hamstead's "Violation of Equal Protection" count fails to state a recognized claim against Trooper Walker. To the extent Mrs. Hamstead is relying on the Equal Protection Clause of the Fourteenth Amendment to attempt to state a claim, this count is duplicative of her Section 1983 count and fails for the same reasons. Regardless, the allegations in the single paragraph supporting this count—that Mrs. Hamstead was subjected to discriminatory and disparate treatment because she was not offered a pre-trial diversion agreement and conditional

[6] "The gravamen of the tort of intentional spoliation is the *intent to defeat a person's ability to prevail in a civil action*." *Hannah*, 213 W. Va. at 717, 584 S.E.2d at 573 (emphasis in original). Therefore, a party asserting a cause of action for intentional spoliation must show that the evidence was destroyed with the specific intent to defeat a pending or potential lawsuit. *Id.*

dismissal of the charges against her—do not relate to Trooper Walker. 2d Am. Compl. ¶ 216. It is not the prerogative of the arresting officer to offer a pre-trial diversion, but that of the prosecuting attorney. *See State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981) (noting that it is at the prosecuting attorney's discretion whether to prosecute a case or move for dismissal). Therefore, Mrs. Hamstead also fails to state a claim under this count.

All of the causes of action Mrs. Hamstead seeks to bring against Trooper Walker in the Second Amended Complaint either restate claims the Court has already found to be not viable or otherwise are subject to dismissal. Consequently, permitting her to file the amended pleading would be futile. This futility is yet another reason for the Court to deny Mrs. Hamstead's Motion to Amend.

In conclusion, all three bases for denial of leave to amend are present here. The proposed amendment is brought in bad faith because of the unexcused delay in moving to amend until after the Court granted the State Police Defendants' motion to dismiss. The State Police Defendants would be unduly prejudiced by having to once again respond to Mrs. Hamstead's claims after having spent considerable time, effort, and money to secure dismissal. And the proposed amended pleading is futile. For all these reasons, the Court should deny Mrs. Hamstead's Motion to Amend.

B. The Court Should Deny Mrs. Hamstead's Motion to Vacate Judgment Because Mrs. Hamstead Has Not Identified Any Valid Reason for Vacating the Court's Order Granting the State Police Defendants' Motion to Dismiss.

The stated reason for Mrs. Hamstead's Motion to Vacate is to permit her to file an amended pleading to "cure what the Court has found to be inadequate pleadings and to adequately set forth facts which state a cause of action against the Defendant Trooper D.R. Walker." Mem. in Supp. of Mot. to Vacate 2 (ECF No. 85-1). As set forth above, the proposed amended pleading is also inadequate and does not state a viable cause of action against the State Police Defendants. Furthermore, Mrs. Hamstead does not cite any other valid reason for the Court to vacate its Dismissal Order.

Under Rule 54(b), a court may vacate an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) substantially different evidence discovered during litigation; (2) a change in the applicable law; or (3) a clear error that causes manifest injustice. *U.S. Tobacco Coop. Inc.*, 899 F.3d at 257.

Mrs. Hamstead identifies no valid reason for the Court to vacate the Dismissal Order. First, there cannot have been any substantially different evidence discovered; discovery is stayed, pending resolution of the various motions to dismiss. Order Granting Defs.' Mot. for Protective Order (ECF No. 73). Second, there has been no change in the past month of the law underlying Mrs. Hamstead's various causes of action or of qualified immunity. Third, Mrs. Hamstead does not identify any error in the Court's reasoning in the Dismissal Order.

Accordingly, even looking beyond Mrs. Hamstead's stated reason for moving to vacate, there is no reason for the Court to vacate the Dismissal Order. Therefore, the Motion to Vacate should be denied.

III. CONCLUSION

In the face of six motions to dismiss the First Amended Complaint for failure to state a claim, Mrs. Hamstead rolled the dice, arguing that she had pled sufficient facts to survive a Rule 12(b)(6) motion. After her gamble did not pay off, and the Court dismissed the claims against the State Police Defendants, Mrs. Hamstead now belatedly seeks to do what she easily could have done before dismissal—amend her pleading. Her belated Motion to Amend is obviously brought in bad faith and would unduly prejudice the State Police Defendants by stringing out this litigation. Additionally, the proposed amended pleading is futile, as it also cannot survive a motion to dismiss. Therefore, Mrs. Hamstead identifies no sound basis for the Court to vacate the Dismissal Order and permit her to file the proposed Second Amended Complaint.

WHEREFORE, for the forgoing reasons, Defendants West Virginia State Police and Trooper D.R. Walker respectfully request that the Court DENY Plaintiff Julie Ann Hamstead's

Rule 59(e) Motion to Vacate Judgment to Allow Post Judgment Motion for Leave to Amend and Motion for Leave to Amend and to Supplement First Amended Complaint.

Dated this 9th day of October 2018.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

JULIE ANN HAMSTEAD,

Plaintiff,

v. **CIVIL ACTION NO.: 3:18-CV-79**
(Honorable Gina M. Groh)

WEST VIRGINIA STATE POLICE;
TROOPER D. R. WALKER, in his official capacity;
CITY OF RANSON, WEST VIRGINIA;
SARGEANT KEITH SIGULINSKY, in his official capacity;
CITY OF CHARLES TOWN, WEST VIRGINIA;
MASTER PATROLMAN JASON NEWLIN,
in his official capacity; THE WEST VIRGINIA
DIVISION OF HIGHWAYS; RODNEY D. HEDRICK, SR.,
in his official capacity; KYLE REED KOPPENHAVER,
in his official capacity; A.B., an unknown individual
known as the West Virginia Department of Highways'
"Muscle Man" on the 2016 Ranson-Charles Town
Green Corridor Fairfax Boulevard Project;
JEFFERSON CONTRACTING, INC., a corporation;
JEFFERSON ASPHALT PRODUCTS COMPANY, a corporation;
DALE DEGRAVE; ALLEN SHUTTS; JOHN TIMOTHY MORRIS;
WEST VIRGINIA UNIVERSITY HOSPITALS-EAST, INC., dba
"Jefferson Medical Center"; KELLY HALBERT, RN;
and X, Y, and Z, unknown persons who conspired and/or
aided and abetted in the fabrication of false criminal charges
against Julie Hamstead,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October 2018, I filed the foregoing "***Defendants West Virginia State Police and Trooper D. R. Walker's Response to Plaintiff's Motions to Vacate Judgment and for Leave to Amend***" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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